MOTION FILED
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No. 99-1691

In the
Supreme Court of the United States

CHRIS BOULAHANIS, *et al.*,
Petitioners,

v.

BOARD OF REGENTS, a body politic and corporate, ILLINOIS STATE UNIVERSITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES J. DENNIS HASTERT AND THE INDEPENDENT WOMEN'S FORUM IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Hon. J. Dennis Hastert, Member of Congress, and the Independent Women's Forum respectfully move for leave to file the brief annexed hereto as *amici curiae*. Petitioners have consented to the filing of this brief. Counsel for Respondents, while not opposing the filing of this brief, answered the request for consent by noting that there was not enough time remaining to receive a collective decision from their clients, the Board of Regents of Illinois State University, and accordingly Respondents' counsel has withheld their consent.

Mr. J. Dennis Hastert submits this Motion for Leave to File Brief *Amici Curiae* in his personal and individual capacity as a Member of Congress, and not on behalf of other Members or the institution of the House of Representatives, or in his official capacity as Speaker of the U.S. House of Representatives.

Mr. Hastert is concerned as a Member of Congress to ensure that the agencies and Departments of the Executive Branch faithfully perform and execute their duties in accordance with the laws and Constitution of the United States. Mr. Hastert brings additional personal expertise and familiarity to the subjects of the Petition from his career as both a participant and a coach in men's wrestling. In both capacities, Mr. Hastert has seen the devastating effects of gender quotas on wrestling and other sports that do not generate revenue for their schools.

The Independent Women's Forum ("IWF") is a nonprofit, nonpartisan organization founded by

women to foster public education about legal, social, and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity.

IWF has sponsored public debate, and provided legislative analysis and educational materials, on the topic of Title IX compliance in intercollegiate and interscholastic athletics. IWF participated as *amicus curiae* in support of Brown University in a Title IX athletics case before the United States Court of Appeals for the First Circuit, *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 186 (1997), as well as *amicus curiae* before this Court in support of Brown University's petition for certiorari in the same case (No. 96-1321).

It is respectfully requested that this Court grant leave to Mr. Hastert and to IWF as *amici curiae* to submit this brief to present their arguments in favor of the granting of the writ of certiorari.

Dated: May 22, 2000
Washington, D.C.

Respectfully submitted,

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QUESTION PRESENTED

1. Can a federal statute, addressing a specific type of discrimination by recipients of federal funds, preclude all causes of action for violations of the United States Constitution committed by persons acting under color of State law?

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INTERESTS OF *AMICI CURIAE*[1]

The statement of the interests of *amici* is set forth in the accompanying motion for leave to file this brief.

BACKGROUND STATEMENT

This case arises from the elimination by Illinois State University ("ISU") of its men's wrestling and men's soccer teams, in an attempt to comply with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and with the related regulations issued by the U. S. Department of Education Office for Civil Rights ("OCR"), 34 C.F.R. 106.41. The Petitioners are male students who were members and prospective members of the eliminated teams, seeking relief in the District Court, under Title IX as well as under the Civil Rights Acts of 1871, including 42 U.S.C. § 1983 and 42 U.S.C. § 1985, for sex and race based discrimination.

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[1] The Petitioners have consented to the submission of this brief. Their letter of consent has been filed with the Clerk of the Court. Counsel for respondents answered the request for consent by noting that there was not enough time remaining before the filing deadline in which to obtain a decision of the Board of Regents of ISU permitting consent. Pursuant to the Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, their members, or counsel contributed money or services to the preparation or submission of this brief.

Among other reasons, the District Court dismissed the Complaint on the basis that the statutory relief available against a school receiving federal funds under Title IX (for sex discrimination), or under Title VI of the Civil Rights Act of 1964 ("Title VI") (for race discrimination), 42 U.S.C. § 2000-d, precluded any resort to the Civil Rights Acts to bring causes of action arising from the same facts and occurrences against institutions or individuals for violations of the United States Constitution while acting under color of State law. Pet. App. at 24a. The Court of Appeals for the Seventh Circuit affirmed the District Court with respect to the issue of statutory preclusion of constitutional claims under Sections 1983 and 1985. Pet. App. at 3a.

As enacted in 1972, 20 U.S.C. § 1681 ("Title IX") provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

The statute forbids discrimination on the basis of sex in the operation of federally funded educational institutions and programs. The statute is administered and enforced by OCR, which has authority to bring legal actions against educational institutions it believes to be violating the law. The Court has also found that Title IX is enforceable by an implied private right of action. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992).

Regulations and interpretations by OCR, however, have gone further in determining what constitutes discrimination in the context of collegiate athletic programs, and how educational institutions can avoid liability under Title IX.

ISU chose the elimination of the men's sports teams to satisfy one of three options available to the school, under the OCR regulations, to bring it into compliance with Title IX. A 1979 "Policy Interpretation" issued by OCR sets forth a three-part test that OCR designed and presently applies to determine whether a school is "discriminating" on the basis of sex in its intercollegiate athletic programs. *See* 44 Fed. Reg. 71,418 (1979). If a school fails to satisfy at least one of the three tests, then OCR presumes that the school is improperly discriminating.

1. The first of the tests asks if athletic participation opportunities are provided to male and female students "in numbers substantially proportionate to their respective enrollments." *Id.* Paradoxically, "participation opportunities" are measured by counting the actual participants on intercollegiate teams, so that unfilled slots on teams do not count as "opportunities." *Cohen v. Brown Univ.*, 101 F.3d 155, 164 (1st Cir. 1996), *cert. denied*, 520 U.S. 186 (1997). This "proportionality" test is bureaucratically attractive because it entails a simple mathematical comparison of the numbers of men and women taking part in sports with the numbers of men and women enrolled at the school. But this test is flawed, as the facts of this case show, because the proportion of men to women in the entire undergraduate population often does not reflect the

proportion of men to women who are actually interested in participating in intercollegiate athletics.

2. If a school does not meet OCR's "proportionality test," *i.e.*, the ratio of women athletes to men athletes does not substantially equate with the total male-female ratio of enrolled students, the school can "show a history and continuing practice of program expansion" responsive to the interest and abilities of the members of the underrepresented sex. 44 Fed. Reg. at 71,418.

3. Finally, if a school cannot show that it has satisfied the proportionality test, nor that it is expanding opportunities for women, it can "demonstrate [to OCR] that the interests and abilities of the members of that [underrepresented] sex have been fully and effectively accommodated by the present program." *Id.* This test requires the school to satisfy all interest among the underrepresented sex.

In this case, ISU determined that it would comply with the three-part test by reducing the proportion of male athletes to achieve proportionality between its men's and women's athletic programs. Specifically, ISU chose to eliminate the two men's teams and add a women's soccer team.

ISU made this decision despite the devastating impact it had on the aspirations and careers of many of the plaintiffs, and in the face of its own interest survey demonstrating that the existing ISU athletic programs more effectively accommodated the interests of those women wishing to take part in sports than it did the interests of those men wishing

to take part.[2] In fact, the survey indicated that women's interests in varsity athletics were almost entirely met by the existing programs, even without the addition of a women's soccer team. Pet. at 6-7.

Though the addition of a women's soccer team alone would have satisfied test two, and the University's survey indicated that test three was, arguably, already satisfied, ISU decided to comply with the "Policy Interpretation" in a way that deliberately injured the members of the men's soccer and wrestling teams, solely because they were men. ISU is a public university operated by the State of Illinois. ISU, and its officers and employees acting under color of State law, are subject to the Fourteenth Amendment of the United States Constitution, and forbidden to deny equal protection of the laws to any person on the basis of that person's sex, or race. U.S. Const. amend. XIV.

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[2] For example, Plaintiff Jamie Burton was heavily recruited by ISU in his native England. Burton chose ISU over a number of other schools based on the promise that he would be awarded a full four to five year scholarship to play soccer at ISU. Burton entered the United States on a restricted visa that was conditioned on the funds he would receive as a result of his ISU athletic scholarship. Burton had aspirations of being a professional soccer player. Because of the elimination of the men's soccer team, he lost both his scholarship and his ability to play his senior year, usually the most productive and crucial season for a soccer player with professional aspirations. Brief for Appellants at 6, *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999).

The Petitioners filed suit against ISU, alleging among other things that (1) ISU violated Title IX by discriminating against them on the basis of sex; (2) ISU violated Title VI by discriminating against a disproportionate number of men of minority race in eliminating the two men's teams; and that (3) ISU as well as its individual officers and employees violated the United States Constitution by denying equal protection of the laws, giving rise to causes of action under 42 U.S.C. §§ 1983 and 1985.

The District Court ruled that the existence of causes of action against ISU under Title IX precluded the availability of any cause of action under Sections 1983 or 1985, arising from the same underlying facts and occurrences. Pet. App. at 53-54, 70. The Court of Appeals for the Seventh Circuit affirmed. Pet. App. at 16-18. The Petitioners now seek the Court's writ of certiorari to review the question presented of preclusion of constitutional claims by Title IX.

REASONS FOR GRANTING THE WRIT

The Courts of Appeal that have addressed the issue have split evenly on the issue of whether Title IX precludes constitutional claims. *Compare Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 757-58 (2d Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996); and *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990) (finding Title IX precludes constitutional claims under Section 1983) *with Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996); and *Lillard v. Shelby County*

Bd. of Educ., 76 F.3d 716, 723 (6th Cir. 1996) (permitting both Title IX and constitutional claims). This divergence, if left unaddressed by the Court, will cause the protection for constitutional rights to depend arbitrarily on geographic location. For this reason, the Court should grant the writ of certiorari.

I. THE CIRCUIT COURT SPLIT CREATES DIVERGENT – AND IN SOME CIRCUITS, INADEQUATE – LEVELS OF PROTECTION OF CONSTITUTIONAL RIGHTS ACROSS THE NATION.

Multiple regimes for redress of civil rights violations currently exist in our legal system. Sections 1983 and 1985 provide causes of action for individuals aggrieved in the violation of their constitutional and federal rights by governments, and individuals, acting under color of State law. Title IX and Title VI specifically regulate, and permit private federal rights of action against, recipients of federal funds. The two regimes are substantively different in scope, focus and effect, yet they often overlap in their subjects.

By ruling that the statutes of Title IX and Title VI can displace broader, preexisting constitutional protections enforced under Sections 1983 and 1985, the Seventh Circuit (as well the Second and Third Circuits that agree with it) overlooked the qualitative distinctions between these causes of action and their attendant remedies. The result has been to deprive arbitrarily the citizens of random parts of the nation of the full benefit and protection of their civil and constitutional rights.

Actions under Sections 1983 and 1985 have been available to individuals in both State and federal courts since the Nineteenth Century. Sections 1983 and 1985 provide jurisdiction for the stated claims of violation of any rights guaranteed by the United States Constitution, or created by federal statute, by reason of acts taken under color of State law. Statutory claims under Title IX, in contrast, are predicated on organizational receipt of federal funds. The statute contemplates federal agency enforcement as its primary remedy, and secondarily implies private rights of action.

The constitutional actions supported by Section 1983 reach both individuals and municipal or State organizations. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The Title IX statutory claims do not reach individual actors, no matter how culpable or immediately responsible they may have been.

While individual Section 1983 defendants can claim qualified immunity from suit if they show that they lacked the necessary intent or recklessness to have violated an established and known constitutional right, there is no requirement under the Title IX Policy Interpretation for mens rea or other evidence of fault. For example, a disproportionate outcome, as defined by OCR, suffices for full liability in the area of intercollegiate athletics.

The following hypothetical demonstrates an important difference between the protections offered by the Constitution and Title IX, and, thereby, the desirability of maintaining both sets of protections: If a State sponsored college, with a 50-50 ratio of men to women in its student body, were to begin with no student athletic programs at all (thereby having no

preexisting discrimination), and yet decide to institute men's and women's intercollegiate athletics, OCR's interpretation would require equal numbers of men and women on sports teams. If the college could only afford to fund 800 team members, proportionality would require teams that provided for approximately 400 men and 400 women players.

But if the demonstrated levels of interest by men and women differed, so that 800 men wished to take part in athletics, and only 400 women wished to take part, the first part of the three-part test would allow the college to fully accommodate all 400 women and short change the men so that only one half of the 800 desiring to play, or 400 men, could be on teams. *See* Curt Levey, *Title IX's Dark Side: Sports Gend.. Quotas*, U.S.A. TODAY, July 12, 1999, at 17A ("Studies consistently find higher rates of interest in athletic participation among males, be they eighth-graders or college students. Thus, it's no surprise men typically far outnumber women in college intramurals, where anyone can participate."). The college would then be in perfect compliance with Title IX, *even if a gender-based animus informed their decision*, because proportionality provides a safe harbor for Title IX compliance under the OCR's Policy Interpretation. *See Kelley v. Board of Trustees*, 35 F.3d 265, 271 (7th Cir. 1994). But that result intentionally satisfies 100% of the women while deliberately failing to satisfy 50% of the men; the college would have discriminated against men solely on the basis of their sex, and have arguably violated the Equal Protection Clause of the Fourteenth Amendment. *See Cohen v. Brown Univ.*, 101 F.3d 155, 195 (1st Cir. 1996) (Torruella, C.J., dissenting), *cert. denied*, 520 U.S. 186 (1997) ("To the

extent that the rate of interest in athletics diverges between men and women at any institution, the [three-part test] would require that such an institution treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, *by law*, while meeting the other student's interest would only aggravate the lack of proportionality.").[3]

The administrators of this hypothetical college might act differently under the present state of the law, solely dependent on where the college was located. In Michigan or Ohio, the administrators would be subject to both Title IX and Section 1983 according to the Sixth Circuit, and thus, might be expected to take more consideration of the relative levels of interest among men and women. Not to do so would expose the administrators and their college to significant legal liability under Section 1983.

Place the college across the borders, say, in either Wisconsin or Pennsylvania, and then the rulings of the Third and Seventh Circuits would effectively shield these administrators from constitutional liability. Unburdened by individual and constitutional accountability, their only remaining incentives would be to protect their college

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[3] This Court need not reach the constitutionality of Title IX or its implementing regulations, because the issue of whether a State actor has violated the Constitution is far different from the issue of whether a statute or regulation is unconstitutional because it permitted the State actor's conduct. *See* Pet. App. at 24, n.6.

from Title IX liability and suit by OCR. Therefore, they would have no compunction about shortchanging their students and discriminating against them on the basis of sex as long as they complied with the three-part test.

As colleges anticipate suits by federal regulators and private parties, they often reduce the number of student athletes who can participate on each men's team, or they eliminate some of their men's teams entirely -- sometimes, very popular and successful teams. For example, the University of California at Los Angeles disbanded a men's swimming team that produced more than twenty Olympic gold medals, while also eliminating their nationally ranked men's gymnastics team. Curt Levey, *Title IX's Dark Side: Sports Gender Quotas*, U.S.A. TODAY, July 12, 1999, at 17A. Each program capped or eliminated represents lost opportunities for student athletes. More than 20,000 such opportunities were eliminated for male student athletes between 1992 and 1997, while less than six thousand new opportunities were created for women during those five years. Kimberly Schuld, Independent Women's Forum, Men's Losses in Collegiate Athletics 1 (1999) (comparing results of NCAA Gender Equity studies).

Regardless of the obligations that may or may not be imposed on educational institutions by the OCR Policy Interpretation, the intent of Title IX was not to restrict opportunities for any group of student athletes. The OCR Interpretation, however, produces exactly that effect. The sad fact is that it is easier and cheaper to comply with the three-part test by eliminating men's teams than by adding teams or

opportunities for women. Thus, men's teams are often cut for no reason other than to meet the proportionality quota – and not to increase opportunities for women. Where this represents discrimination for discrimination's sake, the instant question is whether a constitutional remedy should be available.

The dual availability of statutory and constitutional claims came into being for sound historical and policy reasons, and it should be maintained, rather than allowing the implied repeal of constitutional rights by statutes such as Title IX. But whether the ultimate result of the Court's review would be to reinstate the dual availability of statutory and constitutional claims across the nation, or to establish the uniform preclusion of Section 1983 suits by certain federal statutes, it seems indisputable that a uniform rule should be preferred to the present circuit split.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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